United States Court of Appeals

for the Second Circuit

APPENDIX

77-7221

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN P. LOEBIG,

Appellant,

v.

GEORGE H. LARUCCI,

Appellee.

ON APPEAL FROM THE VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK AT CIVIL NO. 73-CV-158.

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN P. LOEBIG Plaintiff-Appellant	:	
vs	:	Northern District of New York
GEORGE H. LARUCCI Defendant-Appellee	:	Civil No. 73-CV-158

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ten minutes.

The rest of the panel will also return in ten minutes.

(Whereupon after a short recess, the proceedings were resumed as follows.)

MR. RUSTLANDER: Your Honor, I would like to move the admission, for this case, of Mr. James Dattilo, who is assistant to Mr. Loebig.

THE COURT: I will grant the motion. This is for this particular case.

Of course, that also includes Mr. Loebig?

MR. RUSTLANDER: Yes, sir.

THE COURT: Yes, the motion is granted for both of the attorneys.

MR. LOEBIG: Thank you, Judge.

(Whereupon the following took place before the Court and the jury.)

THE COURT: You may open your case.

MR. LOEBIG: Thank you, Your Honor.

My name is, as Mr. Rustlander has told you, Mr. George Loebig, and my associate here is James Dattilo. We are from Pittsburgh, Pennsylvania, and we represent John Loebig, the Plaintiff in this case.

John is the Plaintiff in this case

because back in April of 1971, April the 26th, 1971, John was on a street in Nuremberg, Germany, and he wanted to go to his home about five or six miles away, and he saw Mr. Larucci, represented by Mr. Rustlander, and Mr. Rustlander was kind enough to give him a ride.

Unfortunately, on the way home, which was about five or six miles away, an accident occurred. It wasn't deliberate, but an accident did occur and Mr. John Loebig was seriously injured.

Now, we intend to show, in this case, that the injury that Mr. Loebig sustained was a result of Mr. Larucci's negligence. I said it wasn't deliberate, but we intend to show that Mr. Larucci was negligent, and we intend to show it in this way, among other ways, that if he wouldn't have been negligent, this accident could not have occurred; it would not have occurred. He wasn't acting with the kind of due care that a person should use when he was driving under the conditions, under the circumstances that he was driving, on this particular day.

Now, Mr. Rustlander had gone to great lengths to ask you, and I also ask you to be fair in this case, to try as hard as you can, not to be prejudiced or biased one way or the other. John was seriously hurt, that is true. Mr. Larucci drives a motorcycle, and that

is true, and you are not to hold any of these things, these particular circumstances against either of these parties. Not Mr. Loebig, either.

In other words, we all have the problem of, you know, at times being a little prejudiced and a big biased in favor of one thing or another, and the thing that we do when we start getting onto these things of being a little biased or prejudiced that we sometimes get biased or prejudiced in trying not to be biased or prejudiced. We have to prove ourselves, and we have to prove that we are not prejudiced.

We are going to prove that we are not prejudiced, and we are not going to hold Mr. Larucci driving a motorcycle against him, and we are not going to prove that we cannot be unsympathetic, and that we have to be sympathetic; we are going to prove that we do not have to be sympathetic just because a person was hurt, and then be a little defensive about that. It is a difficult task, and it is a sacred one. It starts, and it is in every civilized society that you have ever heard of, and everyone knows the importance of it.

Going back to the Bible, we all recall when Moses was alive, and he tells his people about sitting in judgment on each other, or how they are to be unprejudiced and unbiased, and completely fair and not

hold this, or anything else against them, and do it all objectively. This was before the time when God spoke to the Hebrews, before they were a nation, and hardly civilized. Certainly in every civilized society, sitting on a jury is an important function, to people living group life, and people living in an orderly society, and without it we just cannot have an orderly society, and it is not perfect but it is the best system that we have, and nothing was ever thought of that was better than a jury to decide the right and wrong remedies between parties that come in before you.

Now, you will remember this case for quite some time. You will talk about it after it is all over, and so forth, but you won't remember it all of the rest of your life, but both of these parties will. If you get into a case as intimately as they are, you will remember it for the rest of your lives, and you will talk about it to other people, and then you will underscore for yourselves and everyone else how important the jury function is.

Thank you for your attention.

Now, I will call for my first witness Mr. John Loebig.

THE COURT: Mr. Rustlander has an opportunity to speak, first.

MR. RUSTLANDER: If it please the Court, and ladies and gentlemen of the jury: Mr. Loebig has said that one of the important things relative to this case, as jurors is that you will perform a function that you perform in no other part of your life and your experiences when you do this. You listen to the radio, and you talk to friends, and neighbors and business associates, and from what they tell you you draw certain conclusions, and you form an opinion.

When you sit as a juror, and this is what I am cautioning you about, that this is the one time when you must receive information and not draw any conclusions from it.

Every case has an orderly procedure that must be followed. The Plaintiffs have an opportunity to present their case in full and then the Defendant has an opportunity to present their case.

We ask you, and we implore you that when you hear the Plaintiff's side of the case, receive that information, and I am sure that you will pay attention, but hold it up in the air, in limbo, and don't draw any conclusions from it. And even after the Defendant has had an opportunity to present his side of the case, you must still refrain from drawing a conclusion, because, as you all know, you are the tryers

of the facts. You determine what happened, actually, back in the City of Nuremberg, Germany, in April, back in 1971 or 1972.

After all of that proof is in there comes a time when Judge Foley tells you what the law is that you must apply to the facts as you find them in this case, and when you retire you are asked to draw conclusions as to responsibility, and as to whether or not Mr. Loebig, is, in fact, entitled to recover a verdict, or whether the Defendant is entitled to receive a verdict of no cause of action.

The opening comments that a lawyer makes to you are in the nature of a road map. We try to point out certain things along the way as to what we will endeavor to prove in this case. The proof will come actually from the witnesses. Mr. Loebig, the attorney, and Mr. Rustlander, the attorney, we are advocates. We are here to present our respective clients' positions as best we can, within all of our abilities, for your consideration and the Court's consideration.

Now, let us go back as to what we will endeavor to prove to you in this case.

In the evening or late afternoon, back in April, April 26th, 1971, I guess that the truth will

show that Mr. Loebig, the Plaintiff, having been discharged from the Service sometime previously, had elected to remain in Germany as a civilian.

My client was still in the Service, and owned a Honda automobile, and they met in the City of Nuremberg that day, and Mr. Loebig asked if he could have a ride back to where he was living at the time. And my client was proceeding easterly, at a period of time when there was considerable traffic, and he was traveling in the lane nearest the center of the road.

I think that his testimony will show that he was proceeding at about 30 miles an hour when he came to an intersection, which was controlled by a traffic light, and the traffic light was green for his direction of traffic. Also that it was his intention to proceed through the intersection and go on his way.

As he approached the intersection he saw a motor vehicle that was stopped in the intersection, but on the other side of the road, preparatory to making a lefthand turn.

When the Defendant was 15 feet from that motor vehicle, that motor vehicle pulled directly in front of his motorcycle. And the proof will show that the Defendant had no opportunity to either turn the vehicle, or to have any warning at all.

Now, you can imagine with a vehicle traveling at that rate of speed, which was in the speed limit, and a car passing a vehicle suddenly presents itself in front of him.

It is our contention, and we expect to prove to you that the Defendant did nothing that a reasonable and prudent person would not have done under the circumstances, and that he was not guilty of any negligence in the slightest degree that caused this accident. And, that if Mr. Loebig was injured, it was as a result of the negligence of this other vehicle that pulled directly in front of the motorcycle, and the impact occurred right within his lane of travel.

I only caution you again: There will come a time when I will have an opportunity to close the case and to comment on it.

I thank you for your attention so far, and I trust that you will keep an open mind thoughout the trial, and render the verdict in this case, pursuant to the oath that you gave, a fair and impartial verdict as to both of these people.

Thank you very much.

THE COURT: Now, I think that we will do what I said. We will take our luncheon recess now. Remember my instructions, ladies and gentlemen: Don't

talk to anybody about the case, and wait for the evidence. The evidence will come from the witness stand, and we will start the trial again at 1:30.

As far as the other jurors are concerned, of course as I told you, you are always welcome to stay in Court, or come back to Court and listen to the trial. But we have no other trials until Tuesday, April 19th, and we think that that maybe the last trial for this term of Court held here in Albany.

But you are excused, and the jurors not sitting in this case are excused until Tuesday, when you will report back to the Clerk, April 19th, and the jurors in this case will come back and start this trial at 1:30.

(Whereupon the jury was excused.)

THE CLERK: Court stands in recess until 1:30.

(Whereupon after a luncheon recess the proceedings were resumed before the Court and the jury.)

THE COURT: Call your first witness, Mr. Loebig.

MR. LOEBIG: With the Court's permission, I call John P. Loebig.

J O H N P. L O E B I G, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOEBIG:

Q Would you state your full name, please?

A John P. Loebig.

Q And where do you live, Mr. Loebig.

A Twenty-two South Jackson Avenue, Pittsburgh, Pennsylvania 15202.

Q And are you married?

A Yes.

Q And is your wife in court today?

A Yes.

Q How old are you?

A Twenty-eight.

Q And when were you born?

A Nineteen forty-eight.

Q Do you recall the date of April 26th, 1971?

A No.

Q Do you remember anything at all about that day?

A No.

Q Did you remember getting on a motorcycle with Mr. Larucci on that day?

A No.

Q Do you remember anything prior to an accident that occurred on that day?

A No.

Q And how tall are you?

A I am six two.

Q How much do you weigh?

A One hundred eighty pounds.

Q Back on April 26th, 1971, how much did you weigh then?

A Two hundred thirty or two hundred forty.

Q How old were you then?

A Twenty-one -- no, twenty-two.

Q Now, were you involved in an accident on April 26th, 1971, is that right?

A Yes.

Q And the accident occurred in Nuremberg, Germany?

A Yes.

Q What were you doing in Nuremberg, Germany at that time?

A What?

Q What were you doing in Germany at that time?

A I was in the Army, and I got discharged in Germany.

Q When did you get discharged?

A April, 1970.

Q And you stayed on in Germany?

A Yes.

Q Why?

A Because I was going to get married.

Q You were going with a German girl?

A Yes.

Q And that is your wife, now?
A Yes.
Q Were you working at that time in Germany?
A No.
Q You were discharged a year prior to the accident, about?
A Yes.
Q What did you do in the Army?
A Put nuclear weapons together.
Q How long were you in the Army?
A Two years.
Q How long were you in Germany?
A All together?
Q Yes.
A Three -- wait, no -- I was there three years, and then I went back for another year, so four years, approximately.
Q Do you remember leaving Germany after the accident?
A No, I was in a coma. I read it. You know, things that you asked me, I read all of those things.
Q What was the first thing that you remember after April 26, 1971?
A Being in the Veterans Hospital in Pittsburgh, strapped in the bed.
Q When was that?
A I don't know, May or June in 1971.
Q How long were you strapped in the bed?

A I don't -- for maybe a month or so. They strapped me in chair. I learned how to --

Q Pardon me?

A I learned how to walk and talk, again.

THE COURT: Do you feel all right?

THE WITNESS: Yes.

THE COURT: Do you want to take a recess?

THE WITNESS: No, thank you.

THE COURT: We will take a ten minute recess until he composes himself. I will excuse you, ladies and gentlemen.

(Whereupon the jury was excused.)

THE CLERK: Court stands for a short recess.

(Whereupon after a short recess the proceedings were resumed before the Court and the jury.)

BY MR. LOEBIG:

Q Mr. Loebig, did you know George Rauski?

A Yes.

Q How long have you known him -- I mean where did you first meet him?

A When we were stationed in Manore Barracks together in the same Artillery Battery.

Q In Germany?

A Yes.

MR. LOEBIG: If the Court please, I would like to rest as to liability with this witness, and reserve the right to call him for damages later on.

THE COURT: All right.

Do you have any questions, Mr. Rustlander? I suppose as far as liability, he doesn't remember the accident at all?

MR. RUSTLANDER: Well, I would like to ask a couple of questions, Your Honor, but I also question the procedure of interrupting his own witness, and splitting his testimony into two parts. I believe that he should continue until he is through with this witness on his own case, before I have to get up on the cross examination.

THE COURT: Do you want to do that, Mr. Loebig?

MR. LOEBIG: It is all right with me, Your Honor.

THE COURT: All right.

BY MR. LOEBIG:

Q Do you recall being in the hospital in the United States in 1971?

A Yes.

Q Do you recall the month that you first knew you were in

the hospital in the United States in 1971?

A May or June.

Q Do you recall what you were doing in the hospital?

A Well, yes. They told me that I was in accident in Germany, and I had three blood clots.

Q Take your time now.

THE COURT: You were in the hospital now, and you were in bed at that time?

THE WITNESS: When you first asked me -- yes, they told me I had three -- three something they took off my brain.

BY MR. LOEBIG:

Q And how long were you in the hospital?

A August.

Q Until August of 1971?

A Yes.

Q What did you do in the hospital?

A Learned how to walk.

Q And what else?

A Talk; use my hands.

Q Did you have any physical therapy?

A And build strength in my body.

Q And did you have any physiotherapy in the hospital?

A Well, yes. What is it? Would you specify, please?

Q You were taught to use your legs?

A Yes, and lift weights because I had no more strength. I had to build all of the strength back in my body.

Q Were you given medication in the hospital?

A Oh, yes, a lot.

Q And you were discharged from the hospital in August of 1971?

A Yes.

Q And what did you do after that? Did you go to work, or what?

A I went back to Germany, in September.

Q And what did you do in Germany?

A I was on pension for the Veterans, because I was 100 percent disabled.

MR. RUSTLANDER: I object to that, Your Honor, as irrelevant.

BY MR. LOEBIG:

Q All right. How long did you stay in Germany?

A A year.

Q A year?

A After I went back, a year.

Q Yes, after you went back?

A A year.

Q And what did you do while you were there?

A Got my strength back, you know, and I took medication like the doctors told me, and I went to German doctors,

* * *

THE COURT: All right, thank you.

(Whereupon the witness was excused.)

MR. LOEBIG: May we approach the bench, Your Honor?

THE COURT: All right. Do you want this on the record?

MR. LOEBIG: No.

(Whereupon a conference at the bench was held, which the reporter was requested not to take.)

MR. DATTILO: For our next witness we will call George H. Larucci.

G E O R G E H. L A R U C C I, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DATTILO:

Q Would you state your full name, please?

A Pardon me?

Q Your full name.

A George Henry Larucci.

Q And where do you live?

A Forty-nine Main Street, Schenevus , New York.

Q Mr. Larucci, will you ever a member of the armed forces of the United States?

A Yes, I was.

Q And which branch of the service were you a member of?

A The United States Army.

Q And when did you enter the United States Army?

A I signed up in January, 1968, and I went on active duty in May of 1968.

Q And then to where were you assigned?

A Viet-Nam --well, first basic, and then Viet-Nam.

Q And did you, in your military career, ever find yourself in Germany?

A After Viet-Nam, right, and in 1969.

Q In 1969 you went to Germany?

A Right.

Q And where were you stationed in Germany?

A Nuremberg.

Q And which barracks did you live in in Nuremberg?

A I was assigned in MIRRO Barracks, but I did not live there all of the time. My wife came over a couple of months later, and we lived in an apartment.

Q You were living off-base in an apartment?

A Yes.

Q While you were in Germany, what type of motor vehicle did you use to get around?

A Well, first I had a Volkswagen Beetle, and then I bought a motorcycle. And after that Volkswagen stopped running I just drove the motorcycle.

Q And what is the size of the motorcycle you were driving?

A A 350cc.

Q And made by whom?

A Made by Honda.

Q And did you know at any time when you were in Germany, John Loebig?

A Yes, I did.

Q And how did you come to know John?

A We were assigned to the same unit.

Q Do you remember the day of the accident in question?

A Yes, I do.

Q Do you remember where you were immediately prior to this accident?

A We were downtown in Nuremberg.

Q And you say we were, and who is we?

A I was referring to me and John.

Q And where were you before you and John were downtown in Nuremberg?

A Well, what time of the day?

Q Immediately proceeding your meeting with John.

A I don't think I follow the question. I was in downtown Nuremberg.

Q You were in downtown Nuremberg with John Loebig. Before you met John Loebig, were you someplace else before that time?

A Oh, I don't know. I must have been someplace.

THE COURT: What time did the accident happen? Do you remember that?

THE WITNESS: Sometime in the afternoon.

THE COURT: Do you know about what time?

BY MR. DATTILO:

Q Do you remember having lunch that day?

A That is what I was doing downtown, getting something to eat.

Q And with whom were you having lunch?

A I was having lunch by myself, and then John came in.

Q Okay. And was it the custom in Germany that the lunch was the main meal of the day?

A I have no idea.

Q And you don't remember?

A I mean, Germans eat three meals a day just like we do.

Q Did you have anything to drink that day with your lunch?

A I don't know that either. I don't think -- I don't think so. I usually didn't drink that much, and if I drank, I drank at night.

Q And so it is your testimony that you don't remember whether you had anything to drink that day?

A I probably would say that I probably didn't have anything to drink at lunch.

Q All right. Mr. Larucci, are you licensed to drive a

motorcycle?

A Presently?

Q Yes.

A Yes, I am.

Q And were you at the time of the accident?

A Yes, I was.

Q And what type of license did you have at that time?

A I had a United States Army Military -- a license to drive, you know.

Q Military vehicles?

A No, it was to drive a private vehicle, but you couldn't use a State license in the Army. You must have an Army license.

Q Did you have a German motorcycle license?

A No, just an Army license.

Q Did you have an Army motorcycle license?

A Yes, I did.

Q And did the law there allow you to drive motorcycles?

A Yes, it did.

Q I was wondering whether the license will allow you to drive a motorcycle on German streets, rather than Army property?

A Both. It was the same as a regular driver's license, except it was issued by the Army.

Q In other words, you are saying that the Army would

license people to drive on German streets?

A Right. In order to drive in the Army, you had to have your, you know, Army card.

Q Excuse me?

A You had to have been authorized, you know, and in the Army, everything they do has got to be authorized by the Army.

Q Well, my question really is: Did the Germans at any time authorize you to drive on their roads? Did you ever, at any time, have a German license for either a motorcycle or automobile?

A No, I never had a German issued license.

Q Now, you said that you were having lunch on the day of the accident, at about what time?

A Early afternoon, around noon time.

Q Around noon?

A Yes, around noon.

Q And then approximately what time did you meet with John Loebig?

A About the same time.

Q Approximately how long after that?

MR. LOEBIG: Just in minutes or hours?

THE WITNESS: You mean minutes?

MR. RUSTLANDER: I object, Your Honor. He is changing the witness's testimony by the next

question. The witness testified that he met Mr. Loebig at lunch, and not sometime afterwards, and then the question is how long after lunch did he meet him.

MR. DATTILO: The witness testified that he was having lunch by himself, and then he met Mr. Loebig.

THE COURT: I am going to ask him: Did you have lunch with Mr. Loebig at this time?

THE WITNESS: I don't know if Mr. Loebig ate anything, but he came in while I was eating lunch.

THE COURT: You were eating lunch?

THE WITNESS: Right.

THE COURT: And then Loebig came in?

THE WITNESS: Right.

THE COURT: And that is how you met him?

THE WITNESS: Right.

THE COURT: All right.

BY MR. DATTILO:

Q And then what conversation did you have with Mr. Loebig at that time, Mr. Larucci, with regard to your driving him to wherever you were to go?

A You mean how did he ask me?

Q Yes.

A He said he was going to his girlfriend's house, and he wondered if I could give him a ride.

Q And did you?

A Yes, I was going to go -- I figured I was going to go back to the barracks.

Q And then you both got on your motorcycle?

A Right.

Q And you were driving and Mr. Loebig was in the back seat?

A Well, on the seat, right.

Q Well, seat, he was behind you on the seat?

A Right.

Q And do you recall the destination of Mr. Loebig on that day?

A I had never been there, but I knew in what direction it was. He was going to tell me how to get there. I don't know exactly where I was going, no, as far as the street or the number of the house.

Q Were you familiar with that area?

A I was familiar enough to know where the street was that he wanted to go towards.

Q Did you frequently drive the roads of that area?

A Once in a while, yes.

Q Frequently, or not?

A Well, do you mean in the area that he was going to?

Q Well, let's say the area of the accident?
A Oh, yes.
Q You were familiar with that area?
A Yes.
Q Okay. To get to the accident, itself now: Do you recall the intersection at which the accident occurred?
A Yes.
Q Could you describe for the jury what that intersection looked like, say, and could you diagram it with your hands or describe it to the jury?
A Well, it was a four-lane road with a median strip in the middle, similar to any four-lane road with a median strip. And where the intersection was there was another road that was the same design, or two lanes on each side and a median street in the middle. It was a large intersection. I don't know if that is satisfactory or not?
Q How many lanes on either side of the center?
A Basically it was two lanes, right and left, and then a median strip, and then a right and a left.
Q Two lanes on either side of the median?
A Right.
Q And do you remember which direction you were traveling, on that day?
A I was traveling out away from the center of town, with

Merrill Barracks on my right, and I believe that is east, and that is what everybody else said, and I believe it was east.

Q Immediately subsequent to the accident, let's say approximately 300 yards, do you remember what your approximate speed was?

MR. RUSTLANDER: Objection. May we have the question read back, please.

(The previous question was read by the reporter.)

THE COURT: After the accident --

MR. DATTILO: This is before the accident.

BY MR. DATTILO:

Q Before the accident, approximately 300 yards before the accident on the street in which you were traveling eastward, do you recall your speed?

A Well, first of all, in order to get onto that street where the accident was, I had to come off another street, and stopped for the light, and make a turn to get onto that street. It might have been less than 300 yards from the accident to that intersection, so, I can't really --

Q Well, then say 200 yards?

A If, like I say, I can't remember the distance between

the two intersections.

Q Let's say between the two intersections, and what was the maximum speed that you achieved after entering onto the street where the accident occurred?

A About thirty.

Q About thirty?

A Thirty or thirty-five miles an hour.

Q Would you say that at 200 feet before the accident that you were traveling thirty?

A Yes.

Q And how about a hundred feet before the accident?

A Yes.

Q And thirty, and then at the time of the impact with the Morrison car, approximately what was your rate of speed?

A The same; unchanged.

Q In other words, you did not slow down from the time that you -- you never slowed down before you hit the Morrison car?

MR. RUSTLANDER: I object to the form of the question.

THE COURT: All right, sustained. The form isn't right. Tell us how fast were you going as you approached the intersection?

THE WITNESS: Thirty miles an hour.

THE COURT: Where did the accident

happen?

THE WITNESS: In the middle of the intersection.

THE COURT: And did you slow your speed before the accident?

THE WITNESS: No. I don't recall putting on my brakes, no.

BY MR. DATTILO:

Q Do you recall whether the intersection at which the accident occurred, was a controlled intersection?

A It had traffic lights, yes.

Q And where were the traffic lights at the intersection?

A Well, they don't hang the lights over the middle of it. It is like on the curbs, you know.

Q From the right and left, or on the right?

A I can't remember if they are on both sides or not. But it was one or the other, and probably on both sides.

Q Do you remember where this particular light was?

A As I say, it was probably on both sides. They are usually all, you know, standardized.

Q And do you remember what color the light was at the time of the accident?

A It was green when I entered the intersection.

Q Do you know how long it had been green?

A What do you mean?

Q I mean, what I mean is did you see it turn green from down the road, or had it just turned green?

A I don't remember that. I don't -- did I see it turn green?

Q Did you see it turn green, yes?

A I don't recall.

Q Okay. As you were driving down the road, prior to the impact with the Morrison car, did you notice what the traffic was on your right?

A It was heavy all around.

Q You were in the left lane?

A Yes.

Q And traffic was heavy on your right?

A It was heavy behind me, and in front of me, and on either lanes and to my right, and going this way and it was heavy traffic.

Q When you say heavy traffic, there were cars positioned close to one another in the lanes of traffic?

A Well, it was just -- it wasn't a traffic jam, and there wasn't just one car on the road, but there was heavy traffic. I would call it moderately heavy traffic.

Q Did you approximate the distance between your motorcycle and the car in front of you?

A No.

Q Do you remember that there was a car in front of you?

A There must have been, but -- I wouldn't -- you know, close to me?

Q But was there a car to your right?

A I believe there was a line of traffic to my right.

Q And you were in the left lane, and you were passing cars at that time?

A That, I don't remember. I mean, cars were, you know, might have been turning off to go to the right hand road, you know. So I couldn't really say I was passing anybody, or anybody was passing me.

Q Do you recall whether -- do you recall what you were looking at, at the time? Were you looking to the right, or were you looking to the left?

A I was looking straight ahead.

Q Did you see the intersection -- the intersection approach you as you were driving toward it?

A I saw the intersection, yes.

Q Okay. And were you aware that cars could make a left turn into the lane in which you were driving?

A You mean, was it legally allowed?

Q Pardon me?

A Was it allowed to make a left hand turn, is that what you mean?

Q No, my question is that you said that you had traveled these roads before?

A Right.
Q Were you aware that traffic, on-coming traffic was permitted to make a left turn?
A Yes.
Q And you had seen this from your prior driving experience in that area?
A Yes.
Q You said that you had to look at lights, and were you looking at the lights to your right, or to your left, or don't you recall that?
A That, I can't say.
Q Do you remember approximately how long traffic had been moving in the flow in which you found yourself at that time? Had the light recently turned green; had the light been green for a while?
A That, I don't remember, either.
Q How tall are you, Mr. Larucci?
A Five four.
Q And what is your weight?
A Well, now it is about one forty.
Q What was it at the time of the accident?
A Between one thirty and one thirty-five.
Q Have you ever driven with anyone on the rear of your bicycle prior to your driving Mr. Loebig?
A Yes.

Q And with whom was that, that you had driven on the rear of bicycle?

A Several people, but primarily the most often was my wife.

Q And how much does she weigh?

A At that time, well, 110 or so.

Q Do you recall whether or not your ability to control the motorcycle was affected by someone sitting on the back of the motorcycle?

A Not that much, no.

Q All right. Did you provide helmets for your motorcycle?

A No, I did not.

Q You did not provide helmets?

A No, I didn't.

Q Were you wearing a helmet, yourself, on the day of the accident?

A No, I wasn't.

Q If Mr. Loebig had asked you for a helmet would you have been able to give it to him?

A No.

MR. RUSTLANDER: Objection.

THE COURT: Sustained.

BY MR. DATTILO:

Q Now, can you describe what happened upon impact; where you went, and where Mr. Loebig went in relation to the intersection, itself, and the car and the motorcycle?

A No, not clearly, no. I can't describe it clearly. All I know is that I went over the front hood of the car and landed on the road.

Q Pardon me, would you speak louder?

A I was thrown over the front hood of the car and landed on the road.

Q On the roof of the car?

A No, on the road.

Q Did you remember having seen Mr. Loebig later?

A I don't remember -- I don't remember seeing him land, but I remember seeing him laying in the road.

Q Okay. Do you know approximately how long you were in the road?

A No.

Q You said it was night -- what time was it when aid came to you at the accident?

A I can't say as far as time goes. I don't know. I can't give you a time.

Q Was it nighttime or daytime?

A When -- I remember an M.P. and it was daytime then.

Q When you were taken in an ambulance was it nighttime?

A I remember it was darker then.

Q It was darker then?

A It was darker, and I couldn't really tell, but it looked like darkness.

Q Now, I want to ask you: Did you have -- what type of brakes did you have on your motorcycle?

A They were an expanding shoe on the front and back. That is an internal shoe.

Q On the motorcycle that you were on, where would a person apply these brakes?

A The rear brakes was the right foot, and the front brake is your right hand.

Q Do you recall having applied these brakes?

A No, I don't. I don't recall having applied them.

Q Were you, at the time of the impact of this -- during this accident, do you remember what part of your motorcycle struck what part of the automobile, that is, the Morrison automobile?

MR. RUSTLANDER: I object to the form of the question.

MR. DATTILO: Well, could you tell me what is wrong with the form of the question?

THE COURT: Wait a minute. I will overrule that. Tell us what part of your cycle hit what part of the car?

THE WITNESS: The front end of my motorcycle hit the right front side of Morrison's car.

THE COURT: What kind of a car was the other car, do you remember?

THE WITNESS: No.

BY MR. DATTILO:

Q Did you say it was the right, the right front side?

A Well, you know where the front tire is?

Q Right. Is that where it hit?

A Yes, as close as I can remember.

Q Pardon?

A As close as I can remember it from flying over it.

Q Do you remember where you first saw the car that was about to make a left turn?

MR.RUSTLANDER: I object to the form of the question.

BY MR. DATTILO:

Q Did you ever see the car that was about to make the left turn?

A Yes.

Q When did you first see that car?

A Upon entering the intersection; in the act of coming to the intersection.

Q Which was approximately how far away from the car?

A Well, maybe about three or four car lengths, something like that. Whatever, you know, coming into the intersection, and to the middle of the lane of the intersection.

Q I didn't hear that.

A I didn't see the car -- I saw the car as I was coming

toward the intersection, you know, entering the intersection, and not in the intersection, and not down the road, but entering, you know, when the car was there.

Q Excuse me?

A And the car was there.

Q What was the position of the car at that time?

A He was traveling -- he had been traveling toward me and was situated in the middle of the intersection on his side of the road stopped, and it appeared that he was ready to make a left hand turn.

Q How did it appear that he was about to make a left hand turn?

A Because he was angled that way.

Q Toward the left?

A You know, the front of the car was angled, as opposed to going straight, and he was sitting like this (Indicating).

Q And you say that you were how far away from his car when you noticed that?

A I was entering the intersection; coming into the intersection.

Q You say it was how many feet again, Mr. Larucci?

A I didn't say.

Q How far away?

A Like I said from the point of the intersection to the -- well, in feet -- I really couldn't approximate it.

Q Why, at that point --

A Because there was a long, it is like a big intersection, and something like on Central Avenue, or something like that, or even bigger.

Q My question was really: How far away was your motorcycle from the car, and not how far away, and that doesn't answer the question?

A When I first saw him?

Q Right.

A When we entered the intersection?

Q Which was how many feet away from the car, approximately?

A I am trying to visualize something like from here to the windows out past that front door, and how many feet that is, I don't know.

Q From here?

A Say out to the other wall.

Q The outside wall?

A Something like one hundred feet.

MR. RUSTLANDER: I object to the form of the question. Excuse me, Your Honor, but it is not the attorney's estimation of what the distance is, but that of the witness.

BY MR. DATTILO:

Q Are you stating that the distance that you were from the car at the time that you saw him was approximately from

where you are sitting to the outside windows of this room, or the outside --

A No, the outside wall, past the doors.

THE COURT: You mean where you can see the lights out where those windows are, Mr. Larucci?

THE WITNESS: Yes.

THE COURT: You have to measure. I don't know how far.

THE WITNESS: That is approximately.

BY MR. DATTILO:

Q Well, then, you didn't slow down from that point?

A No, he was stopped. Traffic was moving; traffic was going through the intersection.

THE COURT: When did you first see this car?

THE WITNESS: About this distance back.

THE COURT: And you are in the left hand lane of two lanes going east, and this car is approaching, going --

THE WITNESS: No, he was not moving; he was just sitting there.

THE COURT: When you first saw him he was stopped?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. DATTILO:

Q Were you aware -- excuse me, but if at this distance, the distance from where you were sitting to the back walls is where you saw him, do you recall at what distance you became aware that he was about to make a left turn?

A From the first time I saw him.

Q As soon as you saw him you were aware that he was going to make a left turn?

A Yes. He was not going to get out of his car. He wasn't moving. It looked like he was waiting for traffic so he could make a left hand turn, I assumed.

Q Were there any cars in the right lane immediately to your right, at that point?

A I believe there were, yes.

Q And your motorcycle doesn't take up too much space on the road, does it?

A No, not really.

Q Did you move over to the right of your lane to avoid that?

A No, he wasn't in my lane.

Q I realize that, but in anticipation of his turn?

A Well, when I drive a motorcycle, you tend to stay toward the center of the road so people on the left and right don't run into you, anyway. I wasn't crowding one side

or the other. I was going down the center of the road.

MR. DATTILO: Okay, I have no further questions.

MR. RUSTLANDER: I have no questions of Mr. Larucci at this time. Of course, I am reserving my rights to call him in the defense portion of the case.

THE COURT: All right, you are excused now.

(Whereupon the witness was excused.)

THE COURT: We will take a ten minute recess, and ladies and gentlemen, remember my instructions, and we will take ten minutes.

(Whereupon the jury was excused.)

THE CLERK: Court stands in recess for ten minutes.

(Whereupon after a short recess the proceedings were resumed before the Court and the jury.)

MR. LOEBIG: Now, I will call Elizabeth Loebig to the stand.

E L I Z A B E T H L O E B I G, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOEBIG:

Q State your full name, please?

* * *

MR. RUSTLANDER: All right. In other words, the Plaintiff has rested now completely as to liability, is this my understanding?

MR. DATTILO: Subject to calling of Mr. Loebig.

MR. RUSTLANDER: But I am talking about liability.

MR. LOEBIG: That is right.

MR. DATTILO: That is right.

MR. RUSTLANDER: And you are referring to my motion at the end of the Plaintiff's case?

THE COURT: I think that it would be helpful, instead of the bringing of the jury in, and letting them go out again.

MR. RUSTLANDER: All right. If Your Honor please, at this time, on behalf of the Defendant in this action, I respectfully move for a directed verdict in favor of the Defendant, pursuant to the Rules of Federal Practice, and furthermore that the claim of the Plaintiff be dismissed on the following grounds: First, that there is a complete absence of any proof of negligence on the part of the Defendant in this action by which any reasonable person could conclude that he was guilty of any negligence, which was the approximate cause of this accident.

Secondly, we feel that the Plaintiff has failed to make out, or to prove a prima facie case against this Defendant.

The only evidence that I can see, and that I think that any responsible person could see relative to the proof that has been presented so far is, that on this particular day in April of 1971 there was an accident, but there is no proof of any speed, lack of control, or any other act either of omission, or commission on the part of the Defendant by which any responsible person could conclude that there was negligence as defined in the law that is to be applied to this case that could result in a verdict in favor of the Plaintiff.

THE COURT: Motion denied.

MR. RUSTLANDER: May I have an exception, Your Honor?

THE COURT: You do.

Bring in the jury.

(Whereupon the following proceedings were held before the Court and the jury.)

THE COURT: Mr. Loebig?

MR. LOEBIG: If the Court please, I would like to recall Mr. Loebig for a few questions concerning his wages and earning power.

* * *

MR. RUSTLANDER: If Your Honor please, I offer Defendant's Exhibit A for identification, into evidence as Defendant's Exhibit A, the military police traffic accident investigation report (Offering to Counsel).

MR. LOEBIG: I have no objection.

THE COURT: Is that one document stapled together?

MR. RUSTLANDER: No, it is two pages and there is another sheet.

THE COURT: I will receive it.

MR. RUSTLANDER: Thank you.

THE CLERK: Defendant's Exhibit A for identification, received in evidence.

(Defendant's Exhibit A marked for identification, received in evidence.)

MR. RUSTLANDER: May I recall Mr. Larucci to the stand, please.

G E O R G E H. L A R U C C I, having been previously sworn, was further examined and testified as follows:

BY MR. RUSTLANDER:

Q Mr. Larucci, we are going to go back now to the date of this accident, April 26th, 1971, and clarify a few things that were brought out by Mr. Loebig's attorney

relative to the happening of this accident and its surroundings.

Now, you were asked several questions whether or not you had a United States Army License to operate a motor vehicles or vehicle?

A Yes.

Q Do you remember that?

A Yes.

Q Now, would you tell us what kind of a license or licenses that you had on the day of this accident?

A I had a United States Army issued motor vehicle license, and motorcycle license.

Q And what was the difference in getting a motor vehicle license as opposed to a motorcycle license?

A There was a separate test for each.

Q And did that license or those licenses allow you to drive in Germany?

A Yes.

Q Any place in Germany?

A Yes.

Q There were no restrictions to the United States Military Installations?

A No.

Q Now, as I understand it from your testimony yesterday that it was still light out at the time of this accident?

A Yes, it was.

Q Now, would you describe -- excuse me -- how would you describe the traffic conditions at the time of the accident?

A They were heavy.

Q Pardon me?

A They were heavy.

Q And the road that you were traveling on was straight and level?

A Yes.

Q All right. And there were two lanes of traffic for the direction that you were going?

A Yes.

Q And there was a median strip?

A Yes.

Q Dividing the two different directions?

A Right.

Q You were traveling on your motorcycle in the lane nearest the median?

A Yes.

Q All right. And were there vehicles traveling ahead of you or behind you?

A Yes.

Q Going in the same direction?

A Right.

Q And there were vehicles on the lane to your right going in the same direction?

A Yes.

Q All right. And was the stream of traffic generally proceeding all at about the same speed?

A Yes, it was.

Q And what was the general speed of those two lanes of traffic?

A Thirty or thirty-five miles an hour.

Q Now, there came a time when you saw the motor vehicle that you were ultimately in collision with, would that be correct?

A Yes.

Q Pardon?

A Yes.

Q And I believe that you testified yesterday that when you first saw that motor vehicle it was as far away from you seated now to the outside wall of this building?

A Approximately.

Q Approximately, all right. When you first saw that motor vehicle you were in that lane of traffic or travel next to the median?

A Yes, I was.

Q And you were going about 35 miles an hour?

A Yes.

Q When you first saw that other car, and let's try and identify it: You found out later that that vehicle was operated by a man by the name of Morrison, would that be correct?

A Yes.

Q And he was also in the military service?

A As far as I know, yes.

Q And so it is referred to as the Morrison car. When you saw that Morrison car for the first time, was it stopped?

A Yes, it was.

Q And where was it stopped?

A It was in the middle of the intersection.

Q And was it in the lane -- was in your lane of travel?

A No.

Q Where was it?

A It was -- coming from his direction, it was on his side of the road, angled to make a left hand turn.

Q But was his car, when you first saw it, completely in his lane of traffic?

A Yes, it was.

Q And it was stopped?

A Right.

Q Did you continue to observe that Morrison car from that point on, until this accident occurred?

A Yes, I did.

Q Now, did there come a time when the Morrison car moved?
A Yes.
Q All right. When that Morrison car moved, how far was your motor vehicle from the Morrison car?
A About 15 feet.
Q What was your speed at that time?
A Thirty or thirty-five miles an hour.
Q Now, at any time up until you got within approximately 15 feet from that car, did that Morrison car move?
A No.
Q And when it moved, in what direction did it move?
A Right in front of me.
Q And did you have time to do anything in the operation of your motorcycle?
A No, I didn't.
Q Now, did the impact occur in your lane of travel?
A Yes, it did.
Q And when Morrison made the left turn he made it right into your lane of traffic?
A Yes, sir.
Q And I take it from what you said yesterday that the front wheel of your motorcycle hit an area approximately over the right front wheel of the Morrison car?
A Right.
Q Immediately prior to seeing that Morrison car moving,

were there still cars moving in the lane to your right?

A I believe there were, yes.

Q And as best as you know, were there vehicles behind you?

A As far as I know, yes, there were.

Q And were they still all moving at about the same speed?

A Yes, they were.

MR. RUSTLANDER: Thank you very much. I have no further questions of this witness.

CROSS EXAMINATION

BY MR. DATTILO:

Q Mr. Larucci, I would like to show you what has been marked as Defendant's Exhibit A, and the back of this Exhibit has a list of speeds and distances, vehicle number one and vehicle number two, and then it has at the base of it it says: "Lawful speed in miles per hour," and could you read what that says for the lawful speed?

A That second number is hard to make out.

THE COURT: Speak up.

THE WITNESS: I said that the second number is hard to make out.

MR. DATTILO: Does it look like 31?

MR. RUSTLANDER: I am going to object. He didn't prepare this report, or make it out.

MR. DATTILO: This is an exhibit.

THE COURT: It is in evidence, so if he

can read it, I will let him read it. I don't know what it is.

THE WITNESS: Yes, it looks like 31, but it looks like it might be -- it could be 37, as far as that goes.

BY MR. DATTILO:

Q Does it look like 31 more than 37?

MR. RUSTLANDER: Isn't that a really for the determination for the jury, Your Honor, as to what it says?

THE COURT: That is right.

MR. DATTILO: Okay.

BY MR. DATTILO:

Q And it is your testimony that you were traveling somewhere between 30 and 35 miles an hour?

A Yes.

Q I have one other set of questions: You said that during the time that you were in this lane of traffic that you were constantly looking at the Morrison car?

A After I saw it, yes. I wasn't steering right at the Morrison car but I was looking ahead. The Morrison car was in my field of vision.

Q Were you looking at it or was it in your field of vision, and I think that there is a difference in that?

A Yes, there is a difference.

MR. RUSTLANDER: I am going to object to that as a double question, Your Honor.

THE COURT: All right.

THE WITNESS: It was one of my primary concerns in entering the intersection, to keep an eye on the Morrison car, yes.

THE COURT: What kind of a traffic light did they have to control that intersection with?

THE WITNESS: The same type as the United States.

THE COURT: Green, yellow, and red?

THE WITNESS: Yes.

THE COURT: And had the light changed at all?

THE WITNESS: No.

THE COURT: Was anything in front of you when this accident happened?

THE WITNESS: Farther ahead of me, yes, there was somebody farther ahead of me, but I don't know how far.

THE COURT: Anything in back of you after it happened in your lane?

THE WITNESS: Yes, there was somebody behind me. I don't know how far away they were, and after the accident, I didn't know -- you know, who they

were.

THE COURT: And you said that you went over the hood of the car?

THE WITNESS: Right.

BY MR. DATTILO:

Q You say that there was somebody in front of you, but you don't know how far?

A Right.

Q And did the car in front of you, at any time, block your view of the Morrison car?

A No, because he was far enough in front of me. I wasn't tailgating, in other words.

Q Then that car was, if he didn't block your view, are you saying that he was beyond the intersection, or before the intersection?

A He might have been.

Q You don't recall?

A No.

Q But you do recall the distance that you first saw the Morrison car?

A A reasonable distance, yes.

MR. DATTILO: I have no further questions and thank you, Mr. Larucci.

MR. RUSTLANDER: I have no further questions, Your Honor.

THE COURT: Thank you.

(Whereupon the witness was excused.)

MR. RUSTLANDER: The Defendant rests, Your Honor.

THE COURT: Any rebuttal?

MR. LOEBIG: No, Your Honor.

THE COURT: All right, ladies and gentlemen, I will excuse you from the Court for a few minutes. There is a legal proposition that we have to talk about and I have told some of you before. Those propositions and problems are for the lawyers and myself and are not your concern.

(Whereupon the jury was excused.)

THE COURT: Mr. Rustlander, I assume that you want to renew your motion?

MR. RUSTLANDER: Yes, I would like to renew my motion, and on all of the grounds set forth that I made at the time of the closing of the Plaintiff's case, and on the additional grounds that now that the Defendant has testified, and concluded his case, that the person that has testified to the happening of this accident is Mr. Larucci, and that on the basis of his testimony and even granting the cross examination that was made, there hasn't been one sintella of evidence or proof of any negligence on the part of Mr. Larucci, and

I renew my motion.

THE COURT: The motion is denied.

MR. RUSTLANDER: Acception.

THE COURT: Now, are you ready with your requests to charge? I hope you have some?

MR. RUSTLANDER: Yes.

THE COURT: We are supposed to have a conference on them.

MR. RUSTLANDER: I think I would prefer to wait and do it tomorrow morning. If you are asking for my opinion, that is it.

THE COURT: All right. I do not know about your travel plans and so forth.

We are free tomorrow morning and I hope everything is all right for the time being. I think so. But we could give it to the jury tomorrow, and it is usually better to do that.

We could have time to go over your requests to charge say at 9:30, and I should give you an idea of what I intend to do.

I did read your requests, and I think that you are both agreed that we are going to instruct the jury upon the New York State Law regarding negligence, and contributory negligence, and I don't know about all of these other statutes. You have a lot of statutes here.

MR. RUSTLANDER: I don't have any statutes. I pulled out a couple of them. I didn't know, for the Court's guidance, and I know one of the Plaintiff's request is not the statute, but his interpretation of what the charge should be, based on the statute, and I would probably object to that, but we can take care of that perhaps at our conference at 9:30 in the morning.

THE COURT: But you have a statute on vehicles turning left and also parked vehicles.

MR. RUSTLANDER: Two sections of the V. and T. Law.

THE COURT: I don't know whether I will get into those specifics; I don't know.

MR. RUSTLANDER: I felt that I should, at least, hand up the report.

THE COURT: I don't know whether this is the one that you are concerned about. The Defendant failed to drive a motorcycle at an appropriate reduced speed, and that is the first request you charge?

MR. RUSTLANDER: That is right, but that is his interpretation of what the section is of 1180A of the Vehicle and Traffic Law.

MR. DATTILO: We would be satisfied if you read the statute in its entirety. That was modified to put it into a charging phraseology. But essentially

it is the same. You can read the statute and we do know what it says.

MR. RUSTLANDER: I have it right here.

(Off the record discussion.)

MR. DATTILO: How about on wearing a helmet and are you referring to that?

THE COURT: We did not get into that. We talked about the pre-trial the duties of wearing a helmet but there is no evidence.

MR. RUSTLANDER: There is evidence that he did not have a helmet.

THE COURT: Also that the driver did not have one.

MR. RUSTLANDER: That is right.

THE COURT: I don't think that we have anything along that line and I am not going to talk about it. The only one is this number one that you talked about, Mr. Rustlander.

MR. RUSTLANDER: I think that we can agree that we throw out my request to charge on the New York State Vehicle and Traffic Law, and that is 1180 because on the face they do not apply.

MR. DATTILO: It is difficult to agree to throw number one out, because it is one point for the charge that is clearly on point in our case, and it helps

us very much. Both sides have presented the Court with Statutes, and both of which are New York Law, as far as traffic safety goes.

MR. RUSTLANDER: I withdraw my request to charge that I handed to the Judge and to the Plaintiff's attorneys relative to the New York State Vehicle and Traffic Law, and if he withdraws his request, I think that the Court can put it in its proper perspective as to the charge of negligence, contributory negligence, generally.

MR. DATTILO: And if the Court wishes to withdraw number one for the Plaintiff's, it is up to the Court. We requested it, and that can be properly ruled upon by the Court.

THE COURT: Well, so that we know: That is on Page 4, 1141.

MR. RUSTLANDER: Yes, that is correct.

THE COURT: And 1162?

MR. RUSTLANDER: Yes.

THE COURT: And 1190?

MR. RUSTLANDER: Yes.

THE COURT: I will mark those refused, and I will refuse number one of the Plaintiff, and take all of the statute out because to me it just doesn't make sense to give New York State statutory law by reading the

law, or by some interpretation concerning an accident that happened over in Germany.

MR. DATTILO: That is fine, Your Honor.

THE COURT: That doesn't sound right.

On the other thing, I think, both of you have standards, the general standards that apply, you know, the negligence, and the contributory negligence. You have these designated over here, and what does that mean?

MR. RUSTLANDER: Those are the general, the general charges in a negligence case in the State of New York and they are usually taken from a volume called "Pattern Jury Instructions."

THE COURT: You have all of those books.

MR. RUSTLANDER: Those are in all of those books.

THE COURT: That is your reference?

MR. RUSTLANDER: Yes, Judge.

THE COURT: Because I didn't know whether you meant statutes, or not.

MR. RUSTLANDER: No, those are not statutes.

THE COURT: Do you want to say anything further? Our Court Reporter maybe a little late in the

morning so we probably won't start until 9:45 or 10 o'clock. He has a dental appointment, and we can be meeting in chambers. We can have our meeting then.

MR. RUSTLANDER: We can meet at 9:45 in the chambers.

MR. DATTILO: Would you include any of your own standard charges for the jury with regard to approximate causation, and explanation of negligence law, in addition to what we have already submitted?

THE COURT: I have charged quite a number of these.

MR. DATTILO: I am sure that you have.

THE COURT: Well, we stand in recess until tomorrow morning.

MR. RUSTLANDER: And that will be 9:45 in chambers, if necessary. I think that we have covered most of these.

THE COURT: I want to ask you, and I do not hold you to this, but how much time do you think that you will want? Half an hour?

MR. LOEBIG: That is okay with me.

MR. RUSTLANDER: That is fine with me, too.

MR. DATTILO: That is fine with me.

MR. RUSTLANDER: The only things that

are in evidence is the certified copy of the bill, a hospital report, and a police report, is that right?

THE CLERK: A V. A. bill, the records of the V. A. Hospital for the Plaintiff, and Defendant's military police accident investigation.

MR. RUSTLANDER: Thank you.

THE COURT: Bring in the jury.

(Whereupon the jury was returned to the courtroom and the following proceedings were held before the Court and the jury.)

THE COURT: Ladies and gentlemen, we have all agreed between the lawyers and myself that this case will be submitted to you tomorrow morning. We are at a very important stage. The evidence is all closed, and the legal problems at this stage have been resolved. Tomorrow morning you are going to hear the summations and my instructions.

I ask you again: Wait until you hear all of those and don't talk to anybody about the case, and please return tomorrow morning, and I thank you for the time that you have spent here the last several days listening to this case and return here tomorrow morning and we will start the trial.

You will hear the closing arguments and the summations of the lawyers at 10 o'clock tomorrow

morning.

(Whereupon the jury was excused.)

THE CLERK: Court stands in recess until 10 a.m. tomorrow morning.

(Whereupon the proceedings were recessed until 10 o'clock the following morning.)

* * * * * * * * * * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- -X

JOHN P. LOEBIG,

Plaintiff

-against- No. 73-CV-158

GEORGE H. LARUCCI,

Defendant.

- -X

Proceedings in the above-entitled matter came on before the United States District Court, Northern District of New York, Federal Building, Albany, New York, on April 7, 1977, at 10 a.m., before the Honorable James T. Foley, United States District Judge, presiding.

A P P E A R A N C E S:

LIDDEL, LOEBIG, and McKEE, ESQS., 625 Grant Building, Pittsburgh, Pennsylvania 15219, Attorneys for the Plaintiff, by GEORGE E. LOEBIG, ESQ., and JAMES A. DATTILO, ESQ., of Counsel.

and

AINSWORTH, SULLIVAN, TRACY and KNAUF, ESQS., 75 State Street, Albany, New York 12206, Attorneys for the Defendant, by: ROBERT K. RUSTLANDER, ESQ., of Counsel.

(Whereupon the following proceedings took place in the Judge's chambers, all counsel being present.)

THE COURT: Let the record indicate that we are in chambers, and we are going to discuss the requests to charge, and we should have a conference, according to the Federal Rules of Civil Procedure. I want to note this for the record because we had discussions about the $5,000 on the V.A. and there is a statute, of course, that give the statutory right to the Government to collect this money. It is 42 United States Code 2251.

So the Government subrogated any monies that are paid by the third party. It is like a statutory lien on a job.

MR. RUSTLANDER: Yes, Your Honor.

THE COURT: So as I indicated yesterday, what I am going to do is charge, and I may read just what Mr. Rustlander gave me, the way he gave it to me, and the ones I indicated, and I think that you have copies about sympathy, and burden of proof, and they are all the usual charges.

Also on emergencies, and other motorists, and so forth, and across traffic, and I am going to deny, and I have marked "Refused" on the ones that we

discussed, Bob.

MR. RUSTLANDER: Relative to specific statutes.

THE COURT: Those that we agreed on.

MR. RUSTLANDER: That is correct.

THE COURT: Then, on the ones that you have, I will refuse number one and number two, because I do cover them, and I will charge three and four and five.

I don't know yet how I am going to do this. I may go through mine, and then read your request to charge, but anything that I refuse here now, you have an exception to automatically, if it becomes a question on appeal.

MR. RUSTLANDER: Thank you, Judge.

I have one other thing to bring up, Judge. I have reviewed the hospital record this morning, and if Your Honor will recall yesterday when we reviewed it, we agreed to take out the entire psychologist's report. There is a duplicate copy of that report in this record, and I would like your permission, with the consent of Counsel, to have that excised from the report now.

THE COURT: It should be taken out.

MR. RUSTLANDER: Thank you, Your Honor.

Just so that you can see that I took out what I said I was going to take out (Offering to Counsel), I will hand this over.

MR. DATTILO: Thank you.

THE COURT: Mr. Dattilo, are you going to tell them in your summation what you think you are entitled to, if you are entitled to a verdict?

MR. DATTILO: Yes.

THE COURT: I am just asking you that because your complaint is different than I have seen. It just says over $10,000.00.

MR. DATTILO: That was only for the jurisdictional minimum of the Federal Court.

THE COURT: Will you have a precise demand in your complaint?

MR. DATTILO: We did not have it in our complaint.

THE COURT: It had no figures. That is up to yourself.

MR. RUSTLANDER: If Your Honor please, I would respectfully request that the Plaintiff's attorney not be allowed to indicate a monetary amount that he is going for in this cause. But if he is, in effect, entitled to a verdict, the amount of that verdict is within the sole discretion of the Court, and not for

an attorney to tell them what they should bring in.

THE COURT: I think that he has a right to tell them what he thinks that he is entitled to, under the evidence. All of the lawyers that I have in here have always told them.

It is unusual because in this case there was a demand for $250,000.00. But of course, that is up to yourself. That is up to you in your summation to say what you think. I don't know whether you are going to do it or not.

MR. DATTILO: I intend to review what we consider to be the permanent injuries, and what we consider to be the injuries that were sustained at the time of the accident, and pain and suffering in detail, and then to go into a review or a summation of the testimony. That is basically it.

MR. LOEBIG: We will mention an amount.

MR. DATTILO: Yes, we will mention an amount, if we are permitted.

THE COURT: All right.

MR. RUSTLANDER: Thank you.

(Whereupon the proceedings in chambers were concluded and the following took place in open Court, before the Court and the Jury.)

THE COURT: Mr. Rustlander, you may sum up for your Defendant.

MR. RUSTLANDER: Thank you, Your Honor.

Ladies and gentlemen of the jury, this is now the portion of the trial where the attorneys for the respective parties have an opportunity to make what is called a summation, and some of you are familiar with that procedure, and what is a summation? It is an argument, it is an argument by an attorney, an advocate for a party setting forth a review of the evidence, and the comments that he wishes to make on that evidence, before the jury.

It seems strange that one of the ironies of this case, and there are always ironies in things, that the month of April, when we try this case, is connected in with a history of this Plaintiff, who was or went into the Army in April of 1968, was discharged from the Army in April of 1970, was involved in an automobile accident in April of 1971, and now some six years later in April of 1977 these two men who are involved in this accident are drawn back here together to review the events that have transpired.

Now, one thing I would like to point out as I comment on the evidence: If my remarks of what the evidence in this case was, and I am talking about what

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THE CLERK: Anyone who wishes to leave the courtroom now must do so because no one will be allowed to leave while the Judge is charging the jury.

THE COURT: Ladies and gentlemen of the jury: For a while in the last 20 minutes or so, I thought it was only me, but I noticed that our Clerk also began to grow cold and started to check on the heat in here. It was getting so cold that I thought I might have to go out and put my overcoat on, and take my robe off, but I think that we will make it now all right. It seems to be changing now.

I believe in patriotism, but it can be overdone when you have a group of people in a room like this.

We have had a trial, starting Tuesday, and this is the fourth day of the trial and of course, the evidence, the nature of the evidence is not too complicated, but I am not the kind of a Judge and never was, or never will be, that tells the jury that you have a simple task before you, because you don't. In each of these cases you have a very serious responsibility, and that is to make a decision one way or the other, based on the evidence, and based on the law that I instruct you in, that must be applied to the evidence.

So you are the six people who will go

to the jury room and your task is a serious one. It is something that you have to do, of course, with patience and calmness, and deliberately, and in a way that our system of justice works in this country. If you do it that way, and I am confident that you will it that way, you will have no regrets.

Now, we all know from the evidence that an unfortunate accident happened April, 1971 in Nuremberg, Germany. You may wonder what the case is doing here in the United States of America, and the City of Albany. It is here because we have a Federal Court, and we have a diversity of jurisdiction, and the parties are entitled to be here. That is Mr. Loebig, and Mr. Larucci. This dispute, of course, in the case, concerns the responsibility of Mr. Larucci as he played a part here in this accident, and there is also a dispute, as you know, concerning the injuries that were sustained by this Plaintiff, the extent of those injuries, and the disability that they will cause.

These cases are tried every day in the State of New York, and we do have a lot of automobile accidents, so at least I can give you that much comfort. The decision that you have to make are made by yourselves throughout the country, and in a great number of instances in the State of New York.

The Plaintiff here, Mr. Loebig, must prove his claim, his cause of action, by what we call a fair preponderance of the evidence in two respects: First, he must prove to your satisfaction by this fair preponderance that this Defendant, and we know him because he testified here, Mr. Larucci, was negligent and careless on this particular day in Nuremberg, Germany, in the operation of that motorcycle, and that such negligence and carelessness on the part of this Defendant Larucci was the approximate cause of the happening of this accident, and was the approximate cause that resulted in the injuries.

Any injuries that you find, if you reach that stage in your deliberations, must only be those that are related to this accident by the evidence that we have had before us.

Secondly, the Plaintiff must show, by this same preponderance of the evidence, there is not a great dispute about this, but he must show and it is a burden imposed upon him by the law, that he, himself, was free from negligence and carelessness on his part, which caused or contributed to cause an accident.

So these are rules of law which you must apply, and I am sure that you don't disagree with them, and you must apply them, as I instruct you upon them

now, and as I will talk about them later.

I do tell you that this Plaintiff, if he fails in either respect, and I have just described the burdens that he has, by this fair preponderance, then his action must fail, he cannot recover money damages at your hands, and the verdict then, it must be a unanimous verdict, and that is the six of you must agree one way or the other, and there would then be no cause of action.

Now, by weight or preponderance of the evidence, we do not mean that this Plaintiff must have the greater number of witnesses. It means simply that you look at the quality of the evidence we had before us, determine where the truth of the situation lies, and then by good judgment and analysis determine from the evidence alone, whether or not the Plaintiff has sustained this preponderance, or over-balance of evidence that he must have in his favor.

Preponderance of evidence, ladies and gentlemen, signifies generally, and of course it is common sense again, that kind of evidence which satisfies your conscience, and carries conviction to your intelligent minds.

Now, of course, your primary function here is to decide the credibility of the witnesses. We did not have a great number of witnesses. The witnesses

who testified in the main about the happening of the accident was Mr. Larucci. The Plaintiff, as you know, doesn't recall anything about the accident or anything about its happening. You do have the report here of the German police authorities, as far as those authorities are made concerning the accident.

But it is for you to decide from the testimony you heard the credibility of all of the witnesses, and that includes the doctors on each side who testified before us, Doctor Popp, and the other doctor for the Defendant.

So it is for you to weigh their credibility. That is something that we do in all of these cases, and we leave it to jurors like yourselves. It is for you to decide the credibility that you want to attach to the testimony of any of the witnesses, and by doing that, I give you the guidelines that I have given in other cases, and if you haven't sat on those other cases, I will tell you about them again.

Remember their demeanor on the witness stand, their frankness or lack of frankness and the probability or inprobability of the testimony as they related it before us, any interest that they might have in the outcome of the lawsuit, the reasonableness of their testimony on a particular issue that they talked about,

as it impressed you.

So, these are tests, of course, that we use in our everyday lives, and apply those tests the same as you would want to measure up anybody else in deciding whether they have given you the true facts of the situation, or whether they are mistaken in anyway.

As I said, that goes to the testimony of Doctor Popp and Doctor Drislane.

I have to tell you, because it is important in our system of justice, that you cannot allow sympathy, to any extent, to enter into your deliberations. If you do that you are doing something that is wrong. You should not allow that. We are all human, and it is one of our best qualities, but you should not allow that to enter into your minds in making your decision. It has to be kept apart from the evidence that we have here, and from the rules of law that I am going to talk about with you.

We do have motions, not a great deal, regarding legal problems, and objections, and so forth. Those matters, of course as I told you, are the concern, and they were before the Court and the lawyers, and they are not your concern in any accident. They belong to me, and I make my rulings in accordance with my best judgment. You are to draw no judgment or to imply anything

from what I may have said regarding the evidence in this case. I can tell you frankly that I am leaving it with you, the question of fact, and the decision that you should properly render here.

Of course, in all trials, as part of our lives, there might be inconsistencies, and discrepancies and so forth, but those are the things that you have to iron out, and go over, and talk about them and decide them. Again, it is your main responsibility which side you want to believe in fixing the responsibility for the happening of the accident, because the claim here is only directed against this one Defendant, Larucci, by this Plaintiff. You have to bring your minds back to Nuremberg, Germany, April, 1971 and reconstruct the happening of an accident that happened at an intersection in that city.

So of course, the thing that is most important is the negligence. The lawyers have talked about it, and it is part of the issue, one of the main issues in this trial. I am sure that you heard about it if you set in any court before you came here, or read about it in the newspapers. But I am going to tell you the definitions that we have in our Federal System.

It is a very common term in the courts, and it simply means that we have a guide as to what a

reasonably prudent person would do under certain existing circumstances. It has been defined as a lack of due care under the circumstances, or the failure to do what a reasonable and prudent person or a man would ordinarily have done under the circumstances, or doing what such a reasonable man, a reasonable and prudent man would not have done under the circumstances. It is not a hard definition to take into your minds and apply. And it has to be applied to the facts and testimony that we have before us.

It was something done by this Defendant, Larucci, at this particular time, or at the time of the happening of the accident, that should have been done, or did he fail to do something that he should have done under the conditions and circumstances that existed at that time.

I do tell you, of course, that the mere happening of an accident in itself, is not evidence of negligence to any extent. Contributory negligence, of course, applies to a Plaintiff. That would apply to Mr. Loebig. It is the same act of omission, or commission, and it means a lack of due care that you find from the evidence that have existed on his part, under all of the circumstances which contributed to the happening of the accident.

Did he, Mr. Loebig, riding on this motorcycle, we know, did he do something that he should not have done, or did he fail to do something that he should have done.

So, it is something that you must take into consideration, because if you found contributory negligence under the law of New York that we are using here, on the part of Mr. Loebig, on this particular day and at that particular time, then he would be barred from any recovery.

Of course, you must realize that he was a passenger, and that he was getting a ride on a motorcycle. He got on the motorcycle, and they were going to some part of Nuremberg, and he was giving Mr. Loebig a ride.

But I tell you that a passenger, even though he is not in control, he has, nevertheless, the duty to exercise his faculties to discover danger, and by communicating that fact to the operator of the motorcycle, endeavor to avoid it, and if this may and should have been done on his part, under the existing circumstances, the thing to do in that respect, of course, and it is not a very serious dispute about it, is to use your common sense, and your good judgment, and what obligation did he have from the fact that the motorcycle, and getting

a ride, and going down through this thoroughfare, and coming to the intersection it is for you to weigh that evidence that we have regarding it and decide whether or not contributory negligence can be found or held against this Plaintiff in any degree.

Now, I am going to tell you about a general rule of the road and, of course, it is a good rule, and we should try to follow it. Unfortunately, many of us don't and we have automobile accidents. But the law enjoins every person to exercise his own rights in a way that he may not negligently imperil the safety of others in the exercise of their rights. It is the duty of each of the operators, the Morrisons, I guess that that is the man driving the other car, and the duty of Larucci, to conduct himself at this particular time, and at this intersection, as a reasonably careful and prudent person would with reference to the rights of the other person in the intersection at that time. Mutual forebearance, of course, is the supreme rule of the road.

Consider all of the circumstances that were described by Mr. Larucci, and the time of day, and the visibility, and the speed he maintained, and the traffic conditions and the observations that he had of the intersection as he came into it. From that it is for you to decide whether or not the Plaintiff, as shown by

the preponderance of the evidence, that Larucci was guilty of negligence, and was involved in some degree of negligence that caused the happening of this accident.

So the Plaintiff, if he will prevail, and I repeat he must prove by this preponderance that this Defendant, Larucci, was careless and negligent, and that such negligence and carelessness was the approximate cause of the accident, the resulting injuries, and if he proves such negligence to your satisfaction by such a preponderance, then he is entitled to a verdict, even though you found negligence on the part of this other operator, Morrison, and if you do find in accordance with these instructions, negligence on the part of the Defendant Larucci, then the Plaintiff, of course, is entitled to a verdict at your hands, despite the negligence of the other operator of the automobile

As far as the doctors are concerned, Doctor Popp and Doctor Drislane, you heard them testify and, of course, they are here as experienced men in medicine to assist us. You heard their opinions, and what their conclusions were medically, and it is for you to take this evidence in the same way that you take the evidence of all of the other witnesses, and it is important to this Plaintiff, if you find negligence on the part of Larucci, and a lack of contributory

negligence on his part, this evidence is important in determining the extent of the injuries, the injuries sustained, and what bearing it will have on his future life in regard to his earnings and physical condition. I do tell you, if you reach this stage in your deliberations, and I give you no intimation, and you have to reach that stage, but you should return a verdict, and that verdict has to have, of course, a unanimous vote from the six of you and you have to agree that you will fairly compensate the Plaintiff. You should consider his pain and suffering. He testified here before us, and you had the advantage of observing him. Pain and suffering is entitled to be compensated for the past, the present, and the future, and there is no yard stick that I or any judge can give you as far as that evaluation. He is entitled to be compensated for the extent of the disability, as you heard it from him and from the medical testimony. Any permanency or disability that he still has and that is related, and it has to be related to the injuries that were sustained as a result of this accident; he is entitled to be compensated for any loss of earnings in the past, the present, or in the future that you find that is supported by the testimony we had before us.

So those are the elements that he is

entitled to recover if you find that the first satisfaction is shown, and that he must show to you that there is liability or negligence on the part of the Defendant-Operator Larucci.

So use your common sense, again, and your good judgment, and you will never have any trouble in determining the amount of damages to be awarded.

One of the charges, of course, that is given often by judges in courts is do not be stingy or extravagant. And you should not speculate at all. You have to base any award of damages on the evidence that we have before us, and particularly in regard to disability on the medical testimony that was given by the doctors.

The conflict that we had here with the doctors, of course, happens in litigation, and it is for you to decide which person you want to accept, and which course you want to take with the particular doctor that testified, and they had variances in certain aspects as to the condition of the Plaintiff.

Now, I have taken here, and I am going to read to you now some requests to charge that were given to me by the attorneys for the parties and, of course, these requests are the same as though I incorporated them in my main charge. They should guide you, and some of them are repetitious, but they should enlighten you

more on the things that you should know before you go to the jury room.

The burden of proof rests with the Plaintiff, and that means that it must be established by a fair preponderance of the credible evidence that the claim Plaintiff makes is true. The credible evidence means the testimony or exhibits, and you will have all of those exhibits in your jury room, that you find worthy to be believed. It means the greater part of the evidence. It does not mean, as I told you, the greater number of witnesses, or the greater length of time taken by either side. It refers to the quality of the evidence, the convincing quality, the weight and the effect that it has on your lives.

Sympathy is listed in these requests, and of course, I tell you again that your verdict is not to be affected in any respect by sympathy for this Plaintiff, because of something that, as I have told you, the best way to handle it is to keep it out of y discussions in your jury room.

I am going to charge you this, because there are aspects, of course, in an emergency situation, because accidents happen as quickly as they do and we know this. A person faced with an emergency who acts without opportunity for deliberation, to avoid an

accident, may not be charged with negligence is he acted as a reasonably prudent person would act under the same emergency circumstances, even though it appears afterwards that he did not take the safest course of exercising the best judgment. Mere error of judgment, or wrong choice of action is not negligence when one is called upon to act quickly in the face of peril. Within the meaning of this rule, a person is faced with an emergency when he is confronted with a sudden and unforeseen condition, not brought about or contributed to by his own negligence.

If you find that this defendant, Larucci, was faced with an emergency and that his conduct was reasonable in the light of the emergency situation confronting him, your finding, of course, if you made that finding, would be that the Defendant was not negligent.

However, if you find that the condition facing the Defendant was not sudden, and should reasonably been foreseen, or was created or contributed to by the Defendant's own negligence, or that even though the condition was sudden, and unforeseen, and it was not created or contributed to by the Defendant, he did not act as would a reasonably prudent person under the same circumstances then, of course, in that situation, if you

find from the evidence, your finding would be that the Defendant was negligent.

It was the duty of each of those motorists, Morrison in the automobile making a turn, and we know he is coming toward Larucci, and Larucci is driving the motorcycle with the Plaintiff on it, and it was their duty to operate with reasonable care, and having regard to the actual and potential hazards existing from weather, and we had no trouble with the weather here, and road and traffic and other conditions.

Each of them was under a duty to maintain a reasonable safe rate of speed, and to have his automobile or motorcycle under reasonable control, and keep a proper lookout under the circumstances then existing, and to see if he was aware of what was in his view, and use reasonable care to avoid an accident.

We had a turning situation, and I think that most of your drive automobiles and you know what occurs in most instances. A motorist turning across traffic must use care in doing so, and consider the danger present in the situation.

He must look out for approaching cars, but he is only obliged to wait until conditions are set, and then he may safely proceed. Other motorists must also show and use due care not to collide with the

turning car.

The relative rights depend upon the distance and speed, and it also goes back to the mutual forebearance, and if we have that quality in the operation of our motor vehicles, it is something that would avoid a lot of these accidents.

But at least, those are the legal principles that were suggested and as I have read them to you, and in the wording that was given to me.

I will charge you, of course, that if the Defendant Larucci failed to take precautions necessary to avoid a collision with the vehicle that was positioned across his lane, when he had ample time to take such precautions, that the failure of the Defendant to take such precaution was the approximate cause of the Plaintiff's injury, then you must find for the Plaintiff.

If you find that the Defendant, Larucci, is liable to the Plaintiff for the injuries sustained, then it is your duty to award money damages. That would be your verdict, and in an amount of money to the Plaintiff for the pain and suffering and loss of wages and earning power, and medical expenses which the Plaintiff has incurred, and he is also, as I told you, entitled to be compensated for any permanency, for any disability that he incurred, that can be directly

related to the accident that you find approximately caused by it.

Now, ladies and gentlemen, these legal principles must be covered. They are sound and settled in the law. It is for you to take them, and apply them to the evidence, and return what, of course, the parties want, a fair and just verdict in accord with the testimony that was given at the trial, and the exhibits that were received in evidence.

Your verdict, of course, as I told you, must be unanimous, and if it is for the Defendant, Larucci, it will be one for no cause of action. If, on the other hand, if there is an amount of money damages, it is for you to decide that amount that fairly and adequately compensates in accordance with the instructions I gave in that regard.

You six people must be unanimous under our system. Six of you must agree, one way or the other. It is your duty, and I am sure that you appreciate it, it is your responsibility to consider the matter carefully, and treat the Plaintiff fairly, and treat the Defendant fairly and impartially, and as I said, so often, you will never have an regrets about the verdict that you return here.

Under our system you select your own

foreman, and that is when you go to the jury room and select out of your group the foreman who you wish to speak for you, and if you have to come back to the Court, and also to announce your verdict that the Clerk will take from you.

I believe that the lawyers will agree that all of the exhibits may go into the jury room? Mr. Rustlander?

MR. RUSTLANDER: Yes, Your Honor.

MR. DATTILO: Yes, Your Honor.

THE COURT: And I am going to ask, at this time, because I must: Are there any objections, Mr. Rustlander?

MR. RUSTLANDER: No objections, Your Honor.

MR. DATTILO: No objection.

THE COURT: Any further requests to charge?

MR. RUSTLANDER: No further requests.

MR. DATTILO: No further requests.

THE COURT: Mr. Willie, and Mr. Turner, the time has come now when I must excuse you, and I do appreciate very much your attention that you have shown during the trial, and I am sure that you would have been good jurors if we had to use you during the deliberations.

You are excused now, and I am going to ask you both to return Tuesday, April 19th, and we will have another civil case ready to be tried on that day. Thank you very much.

(Whereupon the two alternate jurors were excused.)

THE COURT: Swear the Marshals.

(The Marshals were sworn by the Clerk.)

THE COURT: All right, thank you, ladies and gentlemen. You may now retire to the jury room.

(Whereupon the jury retired to the jury room at 11:30 a.m.)

THE CLERK: Court stands in recess, awaiting the return of the jury.

(Whereupon the following took place at 3 p.m., the jury not being present.)

THE COURT: There is a note here from the jury. All right, bring in the jury.

(Whereupon the jury was returned to the courtroom.)

THE COURT: Ladies and gentlemen, have you selected your foreman?

FOREMAN HAZELTON: Yes, sir.

THE COURT: The note says we request

Larucci's testimony in regard to his recollection of the accident, and the subject of speed, and his reaction to the impending collision and so forth. Did you write this note out?

FOREMAN HAZELTON: Yes, sir.

THE COURT: I think that the lawyers and the Court Reporter got together, as I understand it and I believe that they have pin-pointed what parts you want.

Again it says, "We request Larucci's testimony in regard to his recollection of the accident, such as the speed, the accident and the impending collision."

He testified when he was called by the Plaintiff and he testified, of course, in the defense. I don't know, but this is during the first testimony, and he was on the stand twice. Which one was it?

FOREMAN HAZELTON: It was the first time, yes, sir.

THE COURT: He was called by Mr. Loebig?

FOREMAN HAZELTON: Right.

THE COURT: There was a question brought up on the distance when he first saw the vehicle. He mentioned to the outside window, and so forth.

(Whereupon the sections requested by the

jury, and agreed upon by all counsel, were read by the Court Reporter to the Court and the jury.)

THE COURT: Do you think that the Reporter has read all of the parts that you are concerned about?

FOREMAN HAZELTON: Yes, I think so.

(Whereupon at 3:15 the jury was again excused to further deliberate.)

MR. DATTILO: Your Honor, the question that the jury asked to be read was not read back to the jury, and that is the distance between where Mr. Larucci first noted the Morrison car, and Mr. Larucci.

THE COURT: However, the jury said they were satisfied.

MR. LOEBIG: That question isn't answered, that is true.

THE COURT: What part of the testimony is that?

MR. DATTILO: I think that Mr. Larucci described the distance in terms of the distance between the witness chair and the rear wall.

THE COURT: I recall that.

MR. DATTILO: I think that that is what they wanted.

THE COURT: Bring them back out.

(Whereupon the jury was returned to the courtroom.)

THE COURT: Mr. Hazelton, after you left we had a discussion, and you were talking about the part of the testimony of Mr. Larucci where he said that the distance was out to that outer window of our building, as you looked through the doors of the courtroom. And of course, that part wasn't read to you. Do you want that read?

FOREMAN HAZELTON: I was just using that as a reference point, and trying to get to the general time of that testimony.

THE COURT: Do you want that part read?

FOREMAN HAZELTON: I have one lady who would like to hear that part about the distance.

(Whereupon the Court Reporter read the section of Mr. Larucci's testimony described above.)

THE COURT: Does that fill out for you the part that you wanted?

FOREMAN HAZELTON: Yes, sir.

THE COURT: All right.

(Whereupon the jury was excused for further deliberations.)

THE CLERK: Court stands in recess awaiting the jury.

(Whereupon at 3:20 p.m. a recess was taken until 3:55 p.m. when the jury was returned to the courtroom.)

THE COURT: All right, the Clerk will take the verdict.

THE CLERK: Ladies and gentlemen of the jury, have you agreed upon a verdict, and if so how do you find and who is the foreman who shall speak for you?

FOREMAN HAZELTON: Yes, we have reached a verdict. We find no cause for action.

THE COURT: You find no cause for action?

FOREMAN HAZELTON: Yes.

THE COURT: That is your verdict, ladies and gentlemen, and so say you all?

FOREMAN HAZELTON: Yes.

THE COURT: Do you want the jury polled?

MR. LOEBIG: Yes, Your Honor.

MR. DATTILO: Yes, we would like the jury polled.

THE CLERK: Juror Number One, how do you find?

JUROR NUMBER ONE: No cause for action.

THE CLERK: Juror Number Two, how do you find?

JUROR NUMBER TWO: No cause for action.

THE CLERK: Juror Number Three, how do you find?

JUROR NUMBER THREE: No cause for action.

THE CLERK: Juror Number Four, how do you find?

JUROR NUMBER FOUR: No cause for action.

THE CLERK: Juror Number Five, how do you find?

JUROR NUMBER FIVE: No cause for action.

THE CLERK: Juror Number Six, how do you find?

JUROR NUMBER SIX: No cause for action.

THE COURT: All right, the verdict will be entered on the docket. No cause of action, and dismissing the complaint.

Ladies and gentlemen, I want to thank you very much for the time you spent. I know that you gave it careful consideration and you voted according to your conscience and that is what we expect. I do want to thank you for the time you spent with the trial, as well as your deliberation. I am going to excuse you now

and ask you to return April 19th at 9:30 to the Clerk's Office, and we will start another trial at that time. I wish you all a Happy Easter.

(Whereupon the jury was excused.)

MR. RUSTLANDER: On behalf of Mr. Larucci, I want to thank you very much.

THE COURT: I will take your motions now in regard to the verdict, Mr. Loebig.

MR. LOEBIG: I make a motion to set aside the finding of the jury, and I make another motion for a new trial.

THE COURT: I deny both motions to set aside the verdict, and a motion for a directed verdict, and not withstanding the verdict, the motion for a new trial. I now direct the Clerk to enter, as I stated before, in the docket an entry that the jury verdict was no cause of action to be recorded in favor of the Defendant Larucci, and the complaint is dismissed.

We will stand in recess.

THE CLERK: Court stands in recess.

(Whereupon the proceedings in the above matter were concluded.)

* * * * * * * * *

REPORTER'S CERTIFICATE

I, HIRAM F. SHEFFER, Official Court Reporter, in and for the United States District Court, Northern District of New York, do certify the foregoing record to be a true and accurate transcription of the proceedings had at the time and place noted in the heading hereof.

Official Court Reporter
U. S. District Court
Northern District of New York

W I T N E S S E S

		Direct	Cross	Redirect	Recross
John P. Loebig	Page	12		98	100
George H. Larucci		39	108	102	
Elizabeth Loebig		62			
Elizabeth McKee		84			

E X H I B I T S

		Id.	In Evd.
2 (Bill)	Page	88	89
3 (V.A. Medical Records)		88	95
A (Document)		101	102

Plaintiff's Points for Charge.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN P. LOEBIG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 73CV158
	)	
GEORGE H. LARUCCI,	)	
	)	
Defendant.	)	

PLAINTIFF'S POINTS FOR CHARGE

AND NOW comes the plaintiff, JOHN P. LOEBIG, by his attorneys, George E. Loebig, Jr. and James A. Dattilo, to submit to the Court the following points for charge to the jury.

1. If you find that the defendant failed to drive his motorcycle at an appropriate reduced speed as he approached the intersection and that such failure was the proximate cause of the plaintiff's injuries, then you must find for the plaintiff.

Title 62A N.Y. Cons. Stat. §1180 (a), (e).

2. If you find that the defendant failed to drive with proper control under the circumstances and that such lack of control was the proximate cause of the plaintiff's injuries then you must find for the plaintiff.

3. If you find that the defendant failed to take the precautions necessary to avoid a collision with a vehicle that was positioned to cross his lane when he had ample time to take such precautions and that the failure of the defendant to take such precautions was the proximate cause of the plaintiff's injuries, then you must find for the plaintiff.

Plaintiff's Points for Charge.

4. If you find that the defendant is liable to the plaintiff for the injuries sustained by the plaintiff, then it is your duty to award money damages to the plaintiff for: pain, suffering, inconvenience, loss of wages, loss of earning power and medical expenses which the plaintiff has thus far incurred.

5. If you find that the plaintiff has suffered permanent injuries, then you must also award damages to the plaintiff for: future pain, future suffering, future inconvenience, future loss of earning power and future medical expenses which the plaintiff will incur.

RESPECTFULLY SUBMI[illegible]

s/ George E. Loebig

s/ James A. Dattilo

Attorneys for Plaintiffs

Police Report of accident.

NUR-1016-71-562

MILITARY POLICE TRAFFIC ACCIDENT INVESTIGATION — PART A

DATE: 26 Apr 71 | DAY OF WEEK: M

1. PERSONNEL INVOLVED

	GRADE	ORGANIZATION
Hill, Billy L.	SP4	Co A 793rd [illegible]
[illegible]	PFC	Duluth MP Det,

2. LOCATION

MIL RESERVATION: ☐ ON ☒ OFF | ROAD OR STREET ON WHICH ACCIDENT OCCURED: Bayern Str. | NAME AND LOCATION OF MIL RESERVATION, CITY, STATE, ETC.: G

AT INTERSECTION | NOT AT INTERSECTION

NAME OF INTERSECTING STREET	NO. OF FEET	DIRECTION	NAME OF NEAREST INTERSECTING ST., HIGHWAY, OR OTHER PERMANENT IDENT.
Moenchener Str			DMAHA

IF ACCIDENT OCCURED OFF MILITARY RESERVATION AND OUTSIDE CITY LIMITS: INDICATE DIST. FROM (City or Town) ____ MILES ☐ N ☐ S ☐ E ☐ W FROM ☐ CITY LIMITS ☐ CENTER

KIND OF LOCALITY: ☐ MFG OR INDUST ☒ BUSINESS ☒ RESIDENTIAL ☐ SCHOOL OR PLAYGROUND ☐ OPEN COUNTRY ☐ OTHER

3. ROAD

DRIVING LANES	1	2	CHARACTER	1	2	SURFACE	1	2	CONDITIONS	1	2	DEFECTS	WEATHER	LIGHT
ON ↕	X	X	STRAIGHT			CONCRETE	X	X	DRY			HOLES, RUTS, BUMPS, ETC.	CLEAR	DAYLIGHT
↓↑			CURVE	X	X	BLACK TOP			WET			LOOSE MATERIAL ON SURFACE	RAIN	DAWN
THREE OR MORE ↓↕↑			LEVEL			BRICK			MUD			DEFECTIVE SHOULDER	FOG	DUSK
DIVIDED HIGHWAY			ON GRADE			GRAVEL			SNOW	X	X	NO DEFECTS	SNOWING	DARKNESS
OTHER			OTHER			OTHER			OTHER			OTHER	OTHER	DARKNESS

4. TRAFFIC CONTROL

VEH VI	1	2		1	2		1	2		1	2		1	2
STOP & GO SIGNAL			FLASHING LIGHT			WARNING SIGN			ONE-WAY STREET			OTHER (Specify)		
NO TRAFFIC SIGNAL			OFFICER OR WATCHMAN			SOLID CEN. LINE			STOP SIGN					

5. VEHICLES

VEHICLE 1

USA REG OR LICENSE NO.	MAKE	YEAR	BODY TYPE
[illegible]-7562	Buick	1970	2dr sed

UNIT MARKINGS: N/A | PART OF VEHICLE DAMAGED: Right Front

VEHICLE REMOVED TO (Name of garage, home of owner, etc.): Secured at scene by owner

VEHICLE 2

USA REG OR LICENSE NO.	MAKE	YEAR	BODY
[illegible]-0277			

UNIT MARKINGS: N/A | PART OF VEHICLE DAMAGED: [illegible]

VEHICLE REMOVED TO (Name of garage, home of owner, etc.): Released to CO of owner's unit

6. OWNER

NAME: MORRISON, Robert L., 150, 329-14-0473
ADDRESS: D Trp 3/7th Cav, APO 09033

NAME: LARUCCI, George N., [illegible], 078-[illegible]
ADDRESS: B Btry 3/17th Arty, APO 09033 N.Y.

7. DRIVER

NAME, GRADE, SN, UNIT OR ADDRESS	POS IN VEH	AGE	SEX	INJ
Same as # 6 above	LF	18	M	0

DRIVER'S PERMIT NUMBER AND STATE: 0294359 AE Form 206
DRIVING EXPERIENCE (Years): 30 | LIMITATIONS ON PERMIT: ☐ YES ☒ NO

NAME, GRADE, SN, UNIT OR ADDRESS	POS IN VEH	AGE	SEX	INJ
Same as # 6 above	DR	24	M	A

DRIVER'S PERMIT NUMBER AND STATE: 0592509 AE Form 206
DRIVING EXPERIENCE (Years): 6 | LIMITATIONS ON PERMIT: ☐ YES ☐ NO

8. DRIVER'S ACTION BEFORE ACCT.

DRIVER OF VEHICLE 1 WAS HEADED ☐ N ☐ S ☐ E ☒ W ON (Street or Highway): Bayern Str
☐ BACKING ☐ GOING STRAIGHT AHEAD ☒ MAKING LEFT TURN ☐ SKIDDING ☐ MAKING RIGHT TURN ☐ MAKING "U" TURN ☐ OVERTAKING OR PASSING ☐ AVOIDING VEH/OBJ ☐ SLOWING OR STOPPING ☐ STOP IN TRAFFIC LANE ☐ OTHER (Specify)

DRIVER OF VEHICLE 2 WAS HEADED ☐ N ☐ S ☒ E ☐ W ON (Street or Highway): Bayern Str
☐ BACKING ☒ GOING STRAIGHT AHEAD ☐ MAKING LEFT TURN ☐ SKIDDING ☐ MAKING RIGHT TURN ☐ MAKING "U" TURN ☐ OVERTAKING OR PASSING ☐ AVOIDING VEH/OBJ ☐ SLOWING OR STOPPING [illegible] (Specify)

9. OCCUPANTS

NAME AND ADDRESS	POS IN VEH	AGE	SEX	INJ
HALTOM, John 31133 All View Drive, Running Springs, CA	RR	52	M	0
[illegible], Daisy, dep/s	RR	50	F	0
[illegible] dep/dau	RR	11	F	0

NAME AND ADDRESS	POS IN VEH	AGE	SEX	INJ
LUCIC, John T. US Civ, retired soldier	Car			

99

100a
Police Report of accident.

10. PEDESTRIAN

N/A

AGE | SEX

PEDESTRIAN WAS GOING: ☐ N ☐ S ☐ E ☐ W ALONG/ACROSS/INTO (Street, Road or Highway):

FROM (NW to SW corner, or East to West side, etc.): TO:

	CROSSING WITH SIGNAL		CROSSING NO SIGNAL		STANDING ON ROADWAY		WALKING IN ROAD AGAINST TRAFFIC
	CROSSING AGAINST SIGNAL		HITCHING ON VEHICLE		COMING FROM BEHIND PARKED CAR		WALKING IN ROAD WITH TRAFFIC
	CROSSING NOT AT INTERSECTION		PLAYING ON ROADWAY		PUSHING OR WORKING ON VEHICLE		OTHER

11. MED. TRMT.

ACTION TAKEN ON INJURIES	NAME OF PERSON ACTION TAKEN ON	NAME AND ADDRESS OF HOSPITAL
TREATED AT SCENE OF ACCIDENT		
X TAKEN TO HOSPITAL	IARUCCI & LOEBIG	130th Gen Hosp, AP

12. WITNESSES

a. NAME: Same as item # 9	ADDRESS	PHONE
b. NAME	ADDRESS	PHONE
c. NAME	ADDRESS	PHONE

13. DAM. DAMAGE TO PROPERTY (Other than vehicle)

Veh # 1: $350.00 - Veh # 2: Total

INJURY CODE. (Use only most serious one in each space for injury.) "K" - dead before report made. "A" - visible signs of injury as bleeding wound or [illegible] member, or, had to be carried from scene. "B" - other visible injuries as bruises, abrasions, swelling, limping, etc. "C" - no visible injury but complaint of [illegible] momentary unconsciousness. "O" - no indication of injury.

DA FORM 1 JAN 61 19-68

2 [illegible]

MILITARY POLICE TRAFFIC ACCIDENT INVESTIGATION - PART B

Complete item 14, if part "A" is detached from part "B".

14. IDENTIFYING DATA

DRIVER VEHICLE 1 (Name - Grade - SN)	DRIVER VEHICLE 2 OR PEDESTRIAN (Name - Grade - SN)
[illegible]	
VEHICLE 1 (Make, year and body type)	VEHICLE 2 (Make, year and body type)
DATE OF ACCIDENT	PLACE OF ACCIDENT

15. CONTRIBUTING CIRCUMSTANCE

Check one or more for each driver. Use last column, as required for pedestrian.

VEH 1	VEH 2		1	2		1	2	PED	
		EXCEEDING SPEED LIMIT			FOLLOWING TOO CLOSE				HAD BEEN DRINKING
		SPEED EXCESSIVE FOR CONDITIONS			IMPROPER OVERTAKING				DISREGARDED TRAFFIC SIGNAL
X		FAILED TO YIELD			NO OR IMPROPER SIGNAL				OTHER (Specify)
		DISREGARDED STOP SIGNAL			IMPROPER TURN				
		VISION WAS OBSTRUCTED (Explain)							

16. WHAT HAPPENED (Refer to vehicles by numbers)

REMARKS (Summarize how the person(s) involved state accident occured. Identify source of facts recorded. Statement of persons involved and witnesses, when obtained, will be recorded on DA Form 19-24, and attached. Opinions and conclusions of military police will be recorded on DA Form 19-24.)

Operator of Vehicle # 1 stated that he was traveling West on Bayern Str and in the process of negotiating a left turn onto Muenchener Str, when he had to stop for a vehicle in front of him, which had stopped for traffic in the Eastbound traffic lane. When the vehicle in front of him continued on, he glanced to the right and not seeing any traffic, he proceeded to complete his turn, at which time his vehicle was struck on its right front by the front of Vehicle # 2, which was traveling West on Bayern Str.

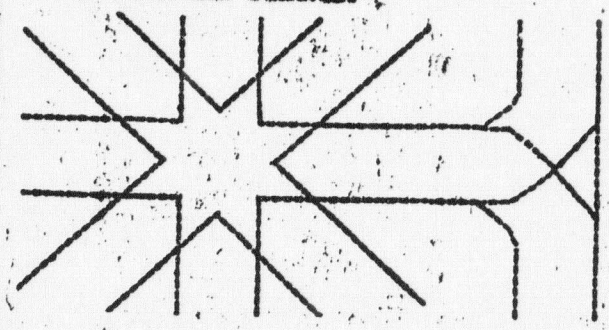
Injuries: Operator of Vehicle # 2 was treated at 130th General Hospital for abrasions and contusions to right thigh, knee and ankle, and released. Passenger of Vehicle # 2 was treated at 130th General Hospital for a serious brain concussion which rendered him unconscious, and transferred to Woerstburg and later to Wiesbaden Army Hospital, from where he was air evacuted to CONUS.

100

Police Report of accident.

17. DIAGRAM OF ACCIDENT

SEE ATTACHED DIAGRAM



(Show North by arrow)

INSTRUCTIONS

1. Follow dotted line to draw outline of roadway at place of accident.
2. Number each vehicle and show direction of travel by arrow:
3. Use solid line to show path before accident:
   Dotted line after accident:
4. Show pedestrian by:
5. Show railroad by:
6. Show distance and direction to permanent landmarks. Identify by name or number.
7. Identify source of facts recorded.

VEH 1	VEH 2	SPEED AND DISTANCES
0	unk	ESTIMATED DISTANCE WHEN DANGER WAS FIRST NOTICED (feet)
unk	unk	ESTIMATED SPEED WHEN DANGER WAS FIRST NOTICED (MPH)
unk	unk	ESTIMATED SPEED AT IMPACT (MPH)
0	unk	DISTANCE TRAVELED AFTER IMPACT (feet)
31	31	LAWFUL SPEED (MPH)

VEH 1 FRONT VEH 2

(Indicate damaged part of vehicle with hachures)

18. MILITARY POLICE ACTIVITY

NAME OF PERSON(S) ~~ARRESTED~~ charged	CHARGES
Robert L. MORRISON	Failure to yield right of way

TIME MILITARY POLICE NOTIFIED (Hour): 1800	TIME MILITARY POLICE ARRIVED AT SCENE OF ACCIDENT (Hour): 1820
WHERE ELSE WAS INVESTIGATION MADE? Furth MP Station	DID MILITARY OPERATOR COMPLETE DD FORM 518, "ACCIDENT IDENTIFICATION CARD?" YES NO
IF OFF MILITARY RESERVATION, WHO ELSE CONDUCTED AN INVESTIGATION? (If other agency conducted complete investigation, so indicate) Nurnberg Traffic Police	DID MILITARY OPERATOR COMPLETE STANDARD FORM 91, "OPERATOR'S REPORT OF MOTOR-VEHICLE ACCIDENT?"
	WAS FORM COMPLETED FROM ON SCENE INVESTIGATION? (If not explain)
IF INVESTIGATION IS INCOMPLETE, EXPLAIN	WERE TESTS FOR INTOXICATION MADE? (If yes, state by whom, medical facility, etc.)

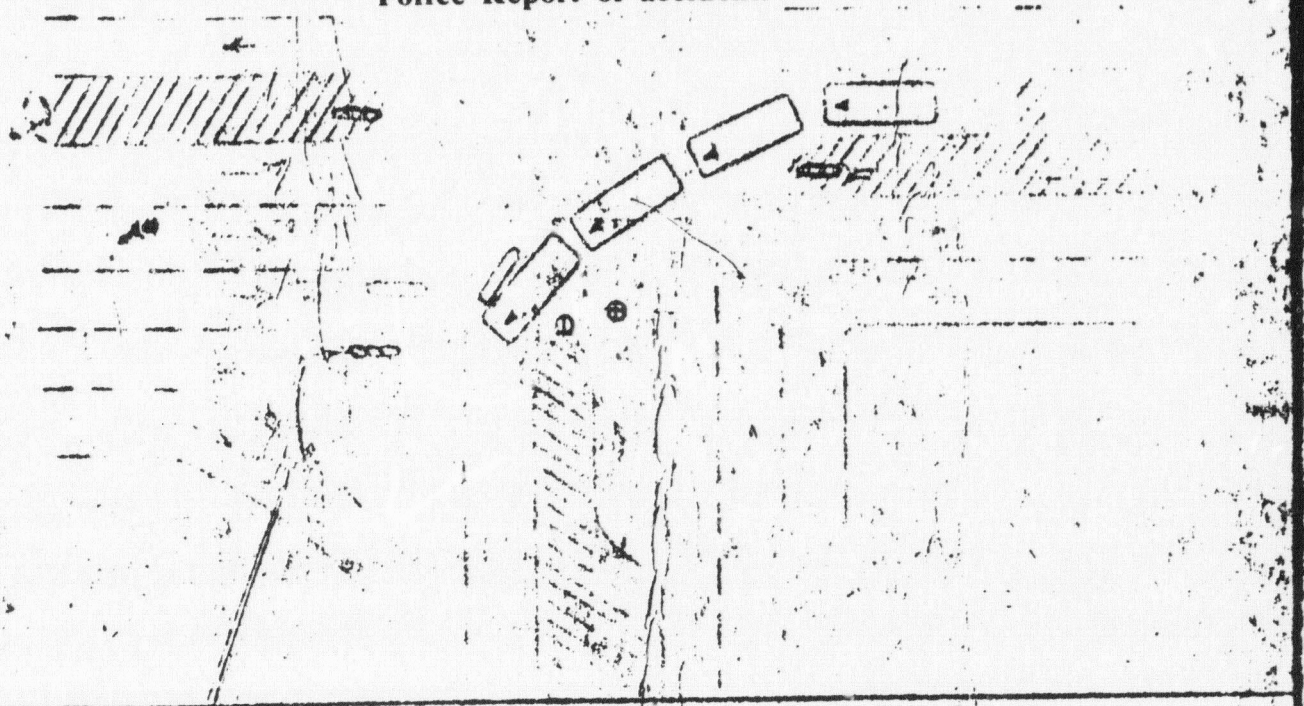
DATE	TYPED OR PRINTED NAME AND GRADE OF INVESTIGATOR	INVESTIGATOR'S SIGNATURE AND GRADE
26 Apr 71	HORACE MOON, PFC	/s/ Horace Moon, PFC

DATE APPROVED	APPROVED BY	INCLOSURES	DISTRIBUTION
21 May 71	[signature] REGINALD A. LA[illegible], SFC, MPC	Diagram	See DA Form [illegible]

(Detached from DA Form 19-68.)

101

Police Report of accident.



DRAWN BY: BALIX J. FANTHING, SGT
252-74-0361,
Co A 7[illegible] MP Bn, APO 09696
TIME/DATE: 1755 Hrs., 26Apr 71
PLACE: INTERSECTION OF MUNCHENERSTR. &
[illegible]STR., NUERNBERG, GERMANY
TYPE: VEH TO VEH
INJURIES: VICT#1- SEVERE BRUISES RT LEG
VICT#2- BRAIN CONCUSSION(SERIOUS)
SEMI CRITICAL CONDITION

[illegible]-1046-7.

LEGEND

MANDATORY DIR OF TRAVEL

PATH OF VEH #1

PATH OF VEH#2

POINT OF IMPACT

RESTING POINT OF VICT#1

RESTING POINT OF VICT#2

ROAD CONDITIONS: GOOD
TYPE OF ROAD: BLACK TOP
TRAFFIC CONDITIONS: HEAVY

STOP & GO SIGNALS BOTH DIRE

102

REQUESTS TO CHARGE

1:23 The burden of proof rests on the plaintiff. That means that it must be established by a fair preponderance of the credible evidence that the claim plaintiff makes is true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds. The law requires that, in order for the plaintiff to prevail, the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must resolve the question in favor of the defendant. It is only if the evidence favoring the plaintiff's claim outweighs the evidence opposed to it that you can find in favor of plaintiff.

1:27 Exclude Sympathy

In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or

displease anyone, be popular or unpopular or, indeed, any consideration outside the case as it has been presented to you in this courtroom. You should consider only the evidence--both the testimony and the exhibits--find the facts from what you consider to be the believable evidence, and apply the law as I now give it to you to those facts. Your verdict will be determined by the conclusion thus reached, no matter whom the verdict helps or hurts.

2:14 Common Law Standard of Care--Emergency Situation

A person faced with an emergency and who acts, without opportunity for deliberation, to avoid an accident may not be charged with negligence if he acts as a reasonably prudent person would act under the same emergency circumstances, even though it appears afterwards that he did not take the safest course of exercise the best judgment. Mere error of judgment or wrong choice of action is not negligence when one is called upon to act quickly in the face of peril. Within the meaning of this rule a person is faced with an emergency when he is confronted by a sudden and unforeseen condition not brought about or contributed to by his own negligence.

2:14 (Cont) If you find that defendant was faced with an emergency and that his conduct was reasonable in the light of the emergency circumstances confronting him, your finding will be that defendant was not negligent. If, however, you find that the condition facing defendant was not sudden and should reasonably have been foreseen, or was created or contributed to by defendant's own negligence, or that even though the condition was sudden and unforseen and was not created or contributed to by defendant, he did not act as would a reasonably prudent person under the same emergency circumstances, your finding will be that defendant was negligent.

2:77 Motor Vehicle Accidents--Duty Toward Other Motorists, In General

It was the duty of each of the motorists to operate his automobile with reasonable care having regard to the actual and potential hazards existing from weather, road, traffic and other conditions.

Each of them was under a duty to maintain a reasonably safe rate of speed; to have his automobile under reasonable control; and to keep a proper lookout, under the circumstances then existing, to see and be aware of what was in his view; to use reasonable care to avoid an accident.

2:81 Motor Vehicle Accidents--Turning Across Traffic

A motorist turning across traffic must use care in doing so considering the dangers present in the situation. He must

look out for approaching cars but he is only obliged to wait until conditions are such that he may safely proceed. Other motorists must also show consideration and use due care not to collide with the turning car. The relative rights depend upon distance and speed.

§1141 Vehicle Turning Left

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.

§1162 Starting Parked Vehicle

No person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety.

§1190 Reckless Driving

Reckless driving shall mean driving or using any motor vehicle, motorcycle, or any other vehicle propelled by any power other than muscular power or any appliance or accessory thereof in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway. Reckless driving is prohibited. Every person violating this provision shall be guilty of a misdemeanor.